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In the
Supreme Court of the United States.

OCTOBER TERM, 1957.

No. 273

BOSTON FIVE CENTS SAVINGS BANK, THE NEW ENGLAND TRUST COMPANY AND OLD COLONY TRUST COMPANY,
Appellants,

v.

CITY OF NEW BEDFORD,
Appellee.

ON APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS.

MOTION TO DISMISS APPEAL, AND ACCOMPANYING BRIEF.

JOSEPH C. DUGGAN,
City Solicitor for New Bedford,
Member of the Bar of the Supreme Court,
WILLIAM B. PERRY, JR.,
BERNARD KESTENBAUM,
Assistant City Solicitors,
Attorneys for Appellee.

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MOTION TO DISMISS APPEAL.

Now comes the appellee in the above-entitled cause and moves that the Honorable Court enter an order dismissing the appeal on the ground that section 1 of chapter 747 of the Massachusetts Acts of 1956 does not impair any obligation of any contract to which the appellants are parties, nor does it deprive the appellants of any vested rights;

wherefore no substantial federal question is presented by the appeal, and said appeal should be dismissed.

JOSEPH C. DUGGAN,

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ON APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS.

BRIEF ACCOMPANYING APPELLEE'S MOTION TO DISMISS.

This is an appeal from the judgment of the Superior Court of Massachusetts entered on January 16, 1958, pursuant to a rescript of the Supreme Judicial Court of Massachusetts, received on January 16, 1958; and appellee respectfully submits this brief in support of its motion to dismiss the appeal on the ground that it presents no substantial federal question; wherefore the Supreme Court of

the United States ought not to take jurisdiction of the case, and should dismiss the appeal.

(a) Opinions Below.

The Supreme Judicial Court's original decision is reported in Mass. Advance Sheets (1958), p. 107, and in 147 N.E. (2d) 187, and is dated January 15, 1958. However, the Court canceled that opinion, and filed a new one on March 14, 1958, dated back to January 15. This opinion, reported in Mass. Advance Sheets (1958), p. 489, and in 148 N.E. (2d) 637, stated more clearly the basis for the Court's judgment.

(b) Grounds on which Dismissal of the Appeal is Sought.

The appellants have based their appeal wholly on the contentions that Section 1 of Chapter 747 of the Massachusetts Acts of 1956 is invalid under Section 10 of Article I and the Fourteenth Amendment to the United States Constitution.

The appellee contends that the Act of 1956 (*supra*) has not impaired the obligations of the contracts: (*a*) between the appellants and the Commonwealth of Massachusetts, and (*b*) between the appellants and the New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, and that the appellants have not been deprived of any vested rights without compensation by the Act of 1956. These being the sole bases of the appeal, the absence of a federal question becomes apparent, and an order of dismissal should be entered.

(c) Questions Presented.

1. Does Section 1 of Chapter 747 of the Massachusetts Acts of 1956 impair the obligations of the contracts be-

tween the Commonwealth of Massachusetts and the bondholders, or of those between the Steamship Authority and the bondholders, thereby violating Section 10, Article I, of the United States Constitution?

2. Does Section 1 of the Act of 1956 deprive the bondholders of vested rights without compensation, thereby violating the Fourteenth Amendment to the United States Constitution?

(d) Statement of the Case.

In 1948 the New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority was created by Chapter 544 of the Massachusetts Acts of that year. Its purpose was to provide transportation of persons and the necessaries of life for the two island communities, Martha's Vineyard and Nantucket. Broad powers were granted to the Authority to purchase, construct, maintain and operate the necessary vessels and facilities. The issuance of bonds was authorized, but Section 2 of the statute declared that the Commonwealth was not pledging its credit to support the bonds ". . . except as herein provided." Section 8 requires the setting up of a reserve fund out of which principal and interest are to be paid. Surplus funds are to go into a redemption fund to be used for purchasing or retiring outstanding bonds.

By Section 9, when income is insufficient to meet the cost of service (defined to include interest and amortization on the bonds, Section 5), the reserve fund shall be used to make up the deficiency and, if that fund is insufficient at the end of the year, the Treasurer of the Commonwealth shall pay over the amount of the deficiency, less the amount in the reserve fund. A tax district, made up of the cities and towns benefited and served by the Steamship

line, is to reimburse the Commonwealth according to certain proportions. Tax exemption and freedom from competition from other steamship lines are provided for by Sections 6 and 7, and Section 11 renders the bonds available for investment quite broadly. Section 6, which authorizes the issuance of bonds, contains the statement which the appellants consider important:

> "While any bonds issued by the Authority remain outstanding, the powers, duties or existence of the Authority shall not be diminished or impaired in any way that will affect adversely the interests and rights of the holders of such bonds."

Whatever changes effected by the amendments of the Act of 1949, Chapter 142, as are pertinent have been included in the above quotation.

In 1949 the proceeds of a $4,100,000 bond issue were used to acquire the existing property, renovate it and begin operations. The construction of a new ferry-type vessel required a second issue of $2,000,000 in 1955. A further issue of $250,000 was necessary in 1957 to complete the vessel, and another $100,000 was authorized for the development of pier facilities in New Bedford necessary to accommodate the new ferry when it is put into service. Nearly the total amount of these issues is outstanding.

The Resolution of the Authority authorizing the bond issues was adopted on April 20, 1949. By its terms, acceptance of the bonds by a holder constitutes assent to the provisions of the Resolution (Section 101). The provisions of the 1948 statute relative to the bonds, the responsibilities of the Commonwealth thereto, and method of handling deficiencies are restated. Other provisions contained covenants to conduct operations efficiently, incurring only reasonable and necessary expenses, employ-

ing no more men than are necessary, and fixing rates in order to meet the cost of service. Principal and interest are to be paid solely from the funds provided therefor in the Act. Section 902 provides that the holders of not less than 10% of the outstanding bonds may enforce any rights given the bondholders. The three appellants own in the aggregate $643,000 of the Authority's outstanding issues of nearly $6,000,000, thereby qualifying to enforce their alleged rights.

The Authority has been unable to meet the cost of service out of current revenues in any year except the first, 1949. The deficit in 1956 was $111,918.33. A deficiency of $340,000 was expected in the proposed budget of 1957. The reserve fund has been exhausted.

The Authority sought to curtail winter service to the mainland port of New Bedford in order to reduce operating expenses. The City of New Bedford, in two suits, attempted to prevent this action of the Authority. *City of New Bedford* v. *New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 329 Mass. 243. *Same* v. *Same*, 330 Mass. 422. The Supreme Judicial Court construed the Act of 1948 as conferring broad powers on the Authority, including the matter, as one of administrative detail, of determining whether winter service to New Bedford could be dispensed with for economy reasons.

Following this decision, winter service to New Bedford was actually suspended during the 1955-56 season. The Legislature then went into action, enacting Chapter 747 of the Massachusetts Acts of 1956. Section 1 required that the Authority maintain daily service year round to the port of New Bedford, and that it construct the dock facilities necessary to accommodate the new ferry-type vessel about to be placed in service. Section 2 of the Act changed the proportional financial responsibilities of the cities and towns in the tax district, increasing New Bedford's share

from 15% to 40%, and decreasing the Islands' share from 75% to 50%.

In spite of the statute, the Authority voted not to construct the dock facilities demonstrated to be necessary to accommodate the new ferry, whereupon an action for mandamus was initiated by the City. The Superior Court granted the writ over the exceptions of the Authority and of the three banks which intervened at the origin of the suit on behalf of the Authority. The Supreme Judicial Court overruled their exceptions relative to questions of evidence and the Constitutional issues. The three banks now invoke the jurisdiction of this Court to review that decision.

(e) Argument.

I. No Contract Obligations of the Bondholders have been Impaired by Section 1 of Chapter 747 of the Massachusetts Acts of 1956.

The Supreme Court of the United States has jurisdiction in a cause such as this only when the state court gives effect to legislation impairing the obligations of a prior contract. *Winona and St. Peter Railroad Co.* v. *Plainview*, 143 U.S. 371, 36 L. Ed. 191. When such is alleged, the Supreme Court will determine for itself the nature of the contracts involved and whether they have been impaired by the statute. *Northern Pacific Railway Co.* v. *Minnesota*, 208 U.S. 583, 52 L. Ed. 630.

The gist of the Act of 1956 is that the Authority is required by it to maintain daily ferry service of a particular type, and construction of a ferry slip, at the port of New Bedford. Its significance is that it has made mandatory what was formerly a matter of the Authority's discretion, and thus the required type of service to New Bedford can-

not be suspended nor can the Authority refuse to construct a ferry slip merely in order to reduce operating expenses.

The contract provision which immediately must be considered, as a result, is that which appellants consider most important. It is that part of Section 6 of the Authority-creating statute of 1948 concerned with the issuance of bonds, reading as follows:

> "While any bonds issued by the Authority remain outstanding, the powers, duties or existence of the Authority shall not be diminished or impaired in any way that will affect *adversely* the interests and rights of the holders of such bonds."

The key word is, obviously, "adversely." Its presence indicates recognition of the fact that changes might indeed be effected, but that, in so doing, bondholders' rights were to be respected only in so far as they shall not be deleteriously impinged upon or reduced.

The provision being meaningless standing by itself, we must look to other terms of the Act of 1948, and of the Resolution authorizing the bond issues, in order to determine whether any of them constitute contract obligations adversely affected by the Act of 1956.

It should be noted at this point that none of the obligations of contract, at least as enumerated by the appellants, has been altered, amended or impaired by provisions of the 1956 statute.

(*a*) The primary obligations of the Authority to pay interest and principal remain unaffected. No matter how high the current costs are as compared to revenues, the Treasury of the Commonwealth is available to make up any deficiencies, with the ultimate financial liability resting on the tax district made up of the communities served by the Steamship Authority. This provision is contained

both in the Act of 1948 in Section 9, and in the Resolution, Section 411. It is the real basis for the security of the bonds. Whether the revocation of it would constitute an impairment of contract obligation is not material to this case. "One cannot invoke [in order to] defeat a law an apprehension of what might be done under it. . . ." "To complain of a ruling one must be made the victim of it." *Lehon* v. *Atlanta*, 242 U.S. 53, 61 L. Ed. 145, 37 S. Ct. 70.

If anything, the security has been put on a more firm basis by Section 2 of the Act of 1956, since New Bedford, with its larger population and valuation as a tax source, has been charged with a much larger proportion (1/6 to 2/5) of the tax district's liability for deficits.

(*b*) The covenants contained in Sections 403 and 603 of the Resolution concerning "reasonable" and "necessary" rules, wages and employment policy, and in Section 410 concerning the fixing of rates to meet the cost of service, are all flexible obligations which must be tied to a standard in order to be meaningful. That standard is the purpose for which the Authority was created as a public transportation facility, as declared by the original statute of 1948, and as altered by the Act of 1956. The obligations of the Authority have not been changed; but what is "reasonable" and "necessary" must be determined in the light of the requirements of year-round service and a ferry slip for New Bedford.

(*c*) To say that the cost of year-round daily service of a particular type and construction of a ferry slip for the City of New Bedford constitutes a lien or charge upon revenues equal or prior to the bonds is to say that the cost of daily service to the Islands is likewise such a lien or charge. No one would contend that daily service to the Islands is not necessary to fulfill the policy of the Act of 1948. The covenants contained in Sections 604 and 610

not to permit such a charge are not affected by the 1956 statute in any manner.

(*d*) Even though daily service to New Bedford was not fixed at the time the Resolution was adopted, it was certainly contemplated, so that the revenues are not being diverted to a new or different purpose in contravention of the obligations imposed by Section 608.

(*e*) The Resolution contains a covenant to transfer surplus funds to a redemption account, as the Authority was required to do by Section 2 of the 1949 amendment. But this does not constitute a mandate compelling that there be surplus funds to be transferred to the account. The obligation of the Authority to use the surplus funds, if there be any, to redeem or purchase outstanding bonds remains unimpaired.

(*f*) All other rights of the bondholders relative to tax-exemption, the general availability of the bonds for investment, and their remedies for enforcement are not affected in any way by the Act of 1956.

Obviously, none of the contract obligations have been impaired by the Act of 1956. As long as the obligation of full performance is not taken away, there is no impairment. *Curtis* v. *Whitney*, 13 Wall. (U.S.) 68, 20 L. Ed. 513.

In truth, the Act of 1956 was no more than a new and clarified declaration of policy by the Legislature. New Bedford is to be regarded as an integral part of the Steamship Authority scheme. This is demonstrated both by the requirements of service and facilities and by the increased financial liability of the City. Whether the Legislature was wise in arriving at this course of action is not the concern of this Court. *Norman* v. *Baltimore & Ohio Railway Co.*, 294 U.S. 240, 79 L. Ed. 885, 55 S. Ct. 407. Public policy is the realm of the Legislature, not the Courts. *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 78

L. Ed. 413, 54 S. Ct. 231. This is particularly so in the realm of public transportation.

II. Section 1 of the Act of 1956 has Not Deprived the Bondholders of Any Vested Rights without Compensation.

Appellants' contentions on this matter amount to no more than a restatement of their alleged contract rights under the banner of the "due process" clause of the Fourteenth Amendment. Since these rights have been shown to be unaffected by the Act of 1956, there is no basis for their argument.

In order to constitute a taking there must be actual interference with, or disturbance of property rights as distinguished from injuries which are merely consequential or incidental. *Noble State Bank* v. *Haskell*, 219 U.S. 104, 55 L. Ed. 112. On the facts here there can be no basis for finding "a taking" in view of the fact that there has been no impairment of contract obligation. Cf. also *St. Paul Gas Light Co.* v. *St. Paul*, 181 U.S. 142, 45 L. Ed. 788, 21 S. Ct. 575, and *Smith* v. *Jennings*, 206 U.S. 276, 51 L. Ed. 1061, 27 S. Ct. 610.

(f) Conclusion.

The foundation on which the appellants have laid their appeal is manifestly an illusory one. The true nature of their purpose is revealed by their expressions of dissatisfaction and actual charges of bias directed at the Legislature and the judicial department of the Commonwealth. The policy of the local law has gone against their wishes, and now they are seeking a reversal of that policy in the highest Court of the land. Such an adjudication by this

Court would do violence to our governmental system. The appellee respectfully requests that the appeal be dismissed for want of jurisdiction, there being no substantial federal question involved in the appeal.

Respectfully submitted,

JOSEPH C. DUGGAN,
City Solicitor of New Bedford,
Member of the Bar of the Supreme Court,

WILLIAM B. PERRY, JR.,

BERNARD KESTENBAUM,
Assistant City Solicitors.